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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 354

BEN SUGARMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT, AND OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT, AND OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

STATEMENT OF THE CASE

Petitioner requests a writ of certiorari to the District Court of Appeal of the State of California, in and for the Third Appellate District, to review the decision of said court affirming the judgment of the Superior Court of the State of California, in and for the County of San Joaquin, which found petitioner

guilty of the crimes of conspiracy to commit grand theft, grand theft, and the violation of Section 556 of the Insurance Code of the State of California.

Pursuant to the convictions under certain counts of the indictment, sentences were imposed upon petitioner by the trial court, to run concurrently in the California State Penitentiary at San Quentin.

The judgment of the District Court of Appeal sought to be reviewed was entered May 6, 1949, and is reported in 91 Advance California Appellate Reports 817, 205 P. (2) 1065. A petition for rehearing was filed by said petitioner within the time allowed by law and was denied by said court. A petition for hearing in the California Supreme Court was filed by petitioner and denied by said court on June 2, 1949. The remittitur issued from the District Court of Appeal in said matter on June 6, 1949.

Thereafter, petitioner again sought to attack said judgment by filing a petition for writ of habeas corpus in the Superior Court of the State of California, in and for the County of San Joaquin. This was denied on June 9, 1949. On June 10, 1949, he filed a petition for writ of habeas corpus with the District Court of Appeal of the State of California, in and for the Third Appellate District. This was denied by said court without opinion on June 15, 1949. Thereafter, petitioner filed a petition for writ of habeas corpus with the Supreme Court of the State of California, which was denied by said court without opinion on July 14, 1949.

It should be noted that the arguments raised by the petitioner Sugarman in his petitions for writs of habeas corpus in the California courts raised no points not considered by the state courts on the appeal in said matter on its merits.

In view of the inaccuracies contained in petitioner's statement of the case, his failure to adopt the facts as set forth in the appellate court's opinion and his incorporation of argumentative material * in the statement, we deem it necessary to set forth an additional statement pursuant to Section 4 of Rule 27 of this court.

On April 3, 1947, defendants Burton, Martin, and petitioner Sugarman were indicted by the grand jury of San Joaquin County on nine counts: Conspiracy to commit grand theft, grand theft, and violation of Section 556 of the Insurance Code. Counts 1 and 2—conspiracy to commit grand theft and grand theft—pertained to all the defendants. Counts 3 to 8 inclusive, pertaining to conspiracy to commit grand theft and grand theft, charged Burton and Martin. Count 9—a violation of Section 556 of the Insurance Code—pertained to defendant Sugarman alone (CT 1-7).† The facts may be summarized as follows:

On February 2, 1949, Don Burton and Mary Burton were the owners of an office building known as the Don Burton Building in the City of Stockton at which

* For example, the assertion (Petition, page 8) that "more than 75 percent of the evidence in the record pertained to the defendants Burton and Martin alone" is not borne out by the testimony of some 90 witnesses who inculpated petitioner.

† CT refers to Clerk's Transcript.

location Burton owned and operated a shoe store on the ground floor of the building (RT III: 989; IX 2831).* He carried two policies of fire insurance with the Phoenix Assurance Company, one covering the fire insurance on the building and a second policy covering the stock or merchandise located in the shoe store (RT II: 430). He carried a policy of fire insurance with the St. Paul Fire and Marine Insurance Company covering furniture, fixtures, and equipment in the building (RT II: 551), and a business interruption policy with the Connecticut Fire Insurance Company (RT II: 582-3).

On Saturday, February 2, 1946, at about 3.45 p.m. the Stockton Fire Department responded to an alarm from the Burton Building, located in the same block as the fire station (RT II: 691; III: 977). An oil fire covering an area of approximately three by two feet and about three feet in height, was found burning on the cement floor in front of the main boiler in the basement of the building (RT III: 983-6). Not more than three to five minutes elapsed from the time the fire department received the call to the time the blaze was extinguished (RT III: 987). This was accomplished by making two passes over the blaze with what is known as a booster line equipped with a dual-purpose nozzle opened to the fog position, an operation that consumed approximately one quart of water (RT III: 985; IV: 1125). The smoke, entirely confined to the furnace room, was insufficient to dis-

* RT refers to Reporter's Transcript.

comfort the firemen or to discolor their clothing or faces, and the firemen found no need of ventilating the shoe store after the fire was out in the basement (RT III: 988; IV: 1127-8). The chief of the Stockton Fire Department testified there was no damage whatever as a result of the fire (RT II: 700). In the first place, none of the employees or customers complained of any discomfort, and the elevators continued to operate during the brief period of the fire. Merchandise located both in the storeroom and in the shoe store proper sustained no damage by soot or otherwise, nor did it become necessary for customers to return or exchange such merchandise; furthermore, no price reductions were made because of the fire (RT IV: 1297, 1302; VI: 1681, 1684, 1687, 1803; VII: 2016-7; V: 1538). Carpeting and other furnishings in the store were undamaged, and even work clothes left hanging in the basement—the site of the fire—by the employees of the building were not harmed in any way (RT V: 1544, 1566, 1595-8; VII: 1902, 1917; IX: 2640-2). Finally, an electric motor which protruded in front of the furnace and was located some 20 inches above the ground directly over the fire, was not damaged (RT XVII: 5136-7).

The morning following the fire petitioner's co-defendant, Frank Martin, was contacted by Burton's Sacramento insurance agent. He asked Martin to accompany Burton to Stockton with reference to the fire loss (RT XIV: 4412-3; 4416-9). Martin advised Burton at that time that he, Martin, had not been

formally employed by the insurance company, but that he would proceed to San Francisco the following day in an attempt to secure authority to handle the loss (RT XIV: 4428; XV: 4443). Thereafter, Martin drove to San Francisco with advance adjuster's reports and delivered two of them to Mr. English, Manager of the Phoenix Assurance Company, informing English that there had been a very great loss and requesting the aid of a salvage man (RT XV: 4444-6; II: 440-1). He asked English if the company would object to the employment of Sugarman, with whom Martin had been acquainted for eight years and by whom he was then employed for the purpose of appraising properties in Portland, Oregon (RT II: 443; XV: 4639-42; XVI: 5032). English, it seems, had known Sugarman for 30 years and authorized the latter's employment (RT II: 443). Martin then advised English that Burton's Sacramento agent desired Martin to handle the adjustment, and English also agreed to this suggestion (RT XV: 4446-51). Subsequently, Martin successfully solicited the job of adjusting the loss for the St. Paul Company and the Connecticut Fire Insurance Company on the basis that he was acting in that capacity for Phoenix (RT XV: 4450-2).

Martin later went to the office of Sugarman Brothers and told them that English had chosen petitioner to handle the salvage (RT XV: 4454; XVI: 5001). Following this meeting petitioner drove alone to Stockton, where he was met by Martin and intro-

duced to the manager of the store. He proceeded to inspect the merchandise in the store and in the stockrooms (RT XVI: 5002-4). This inspection, Sugarman testified, resulted in a determination that the merchandise had been damaged; however, he was unable to ascertain the salvage thereof since the inventories were in Sacramento, where he arranged to meet Martin the next day (RT XVI: 5004).

At that meeting Martin introduced petitioner to Burton who was accompanied by one Saunders, an employee (since deceased). The testimony is contradictory as to the conversation that followed. Martin stated that Burton objected to his stock being taken over for salvage (RT XV: 4461); Sugarman testified that he was left alone with Saunders while Martin and Burton held a private conversation (RT XVI: 5007). Sugarman finally requested that inventory figures in addition to those shown him, be placed at his disposal and asked Martin to notify him when the same were ready (XVI: 5006-7).

The following month Burton furnished these figures, some of them being reflected on adding machine tapes given to Martin and shown in turn by him to Sugarman. Notwithstanding his employment for that purpose, no report was ever forthcoming from Sugarman as to whether or not the Phoenix Company should take over the Burton stock for salvage; instead, he prepared a "merchandise loss" (People's Exhibit No. 3), using the figures and computation on the adding

machine tapes he had received from Martin (RT XV: 4658). The figures set forth in this exhibit were thereafter incorporated in their entirety in Martin's final proof of loss transmitted to the Phoenix Company, upon which payment was made to Burton, its insured. Martin informed Sugarman, it also appears, that he was going to use the percentage arrangement which Sugarman had theretofore worked out as the basis of settlement with Burton. Sugarman admitted knowledge of this fact (RT XVI: 5032).

In February, 1946, one Harry Ex—likewise an adjuster—also made his appearance on the scene. The record shows that he and Sugarman had enjoyed a business acquaintance for over 20 years (RT VI: 5038; X: 2951; IX: 2747). It was the contention of the defense that Burton, acting upon the suggestion of his employee Saunders, had hired Ex to represent his interests (RT XVI: 4867-8); nevertheless, the income tax adviser for Burton, as well as his head bookkeeper, were kept in ignorance of Ex's status, and to Miss Brudigan (the head bookkeeper for Burton) Martin stated that the large fee eventually paid by her employer to Ex was none of his (Martin's) concern, adding that it was a private matter between Burton and Ex.

The activities of Ex following his alleged employment by Burton were described in considerable detail by the defendants, although they never called him as a witness to corroborate their respective claims. Thus, there was testimony that Ex, upon his arrival in Sac-

ramento, advised Burton not to let Sugarman know of his employment, and later submitted a contract for his services, which Burton signed (RT XVI: 4868). According to the defendants, the manager of the Stockton store then prepared a detailed inventory for Ex, and he and Burton thereafter had three or four telephone conversations in which Ex advised Burton how to handle his claim (XVI: 4869). Later, Ex called at Burton's Sacramento office and desired to know the basis on which the Phoenix claim had been settled. When Burton informed him the settlement was for more than $15,000, Ex insisted that he immediately be compensated on a basis of 10 percent of the whole inventory if he succeeded in saving the stock. To pacify Ex, according to the defense, Burton gave him a check that day for $8,500 (RT XVI: 4871). In that connection, it is interesting to note that Burton's subsequent settlement with Martin was made without Ex's knowledge or approval, notwithstanding the claim of the defendants that Ex had been hired to protect Burton's interest.

The day following Ex's receipt of the $8,500 check a person of then unknown identity appeared at the San Francisco Main Branch of the Bank of America and presented the instrument for payment (RT IX: 2774, 2776). One M. J. Simpson, a Vice President of the San Francisco bank, filled out an application for exchange, requesting and later receiving a cashier's check in the sum of $3,312.50 (People's Exhibit 39).

The following notation appears on that exhibit: "M. J. Simpson for Harry Ex" (RT IX: 2777). The balance of Burton's check, amounting to $5,187.50, was transferred over to the bank's commercial department and taken in cash. Two names appeared at the bottom of the debit slip which went through the commercial department and indicated that it was paid in cash: "A. Semenza," the receiving teller and an assistant cashier in charge of the Exchange Department, and "M. J. Simpson."

From February 28, 1946, to September 23, 1946, petitioner Sugarman and M. J. Simpson were joint tenants of safe deposit box No. 9016 in Simpson's bank (RT IX: 2785). From September 23, 1946, to May 24, 1947, safe deposit box No. 409 in Simpson's bank stood in the name of petitioner Sugarman and his brother Harry, with power of attorney or agency held by M. J. Simpson (RT IX: 2783). On May 24, 1947, the date Simpson was subpenaed by the San Joaquin County Grand Jury, the tenancy of the last-numbered box was placed exclusively in the name of petitioner Sugarman (RT IX: 2783, 2802).

On March 5, 1946, three days after the cashier's check for $3,312.50 was secured from Simpson's bank, Ex negotiated a cashier's check in that amount through the Union Bank and Trust Company, Los Angeles, which was later paid by Simpson's bank on March 6, 1946 (RT IX: 2787).

On June 22, 1946, sums aggregating $770 were deposited to the account of Frank O. Martin, general

adjuster, in the Tule Lake Branch of the Bank of America. Of this amount, $520 was represented by a check drawn against the account of Sugarman Brothers in Simpson's bank at San Francisco (RT IX: 2789-90). At the trial, the defense sought to establish that this last check represented payment of services rendered by Martin on petitioner's behalf in Portland, Oregon.

Burton, meantime, had contacted one Wolters with the view of painting the Stockton building under the coverage reflected in the second Phoenix policy (RT VII: 2236). Wolters gave Martin an estimate and was told to proceed. He then repainted a basement, shoe store, halls, stairway, storage rooms, corridors, and some thirty-six offices in the building (RT VII: 2238, 2224-5, 2255). The statement of Wolters in the sum of $9,610, together with a blank billhead, were subsequently mailed to Burton at Sacramento. Martin, or his stenographer at Martin's direction, filled in the blank billhead, raising the amount to $14,952.51 (RT VIII: 2502, 2504-5). This latter fact was stipulated to by the defense upon the trial. Burton then paid Wolters a total of $9,610 although he had received $14,952.51 from the Phoenix Company (RT VII: 2265). At the trial it was brought out that Martin went to Stockton on October 1, 1946, and handed Wolters a check in the sum of $1,957, which he requested Wolters to cash and return the proceeds to him (RT VII: 2265). Martin also asked Wolters to show this check on his books, advising him that he would take

care of any increase in the latter's income tax (RT VII: 2267). In 1947, after the defendants were indicted, Martin accompanied Sugarman and Sugarman's son on a visit to Wolters, at which time Wolters was told to keep quiet and not to talk to anyone (RT VII: 2273).

Martin's original report to the St. Paul Company estimated a 20 percent loss under the policy (RT IX: 2865-6); this estimate was later raised to 55 percent, and again to 85 percent, and finally Martin filed his closing report, on the strength of which the St. Paul Company issued a draft to Burton for $6,716.57 (RT IX: 2882). The further sum of $132.50 was paid to Martin in accordance with his statement (RT IX: 2877).

On the Connecticut Company policy, Martin prepared an adjuster's report which estimated a loss of 10 percent on the use and occupancy policy carried with that company (RT X: 2886). In another letter to the company, Martin falsely stated that the store did not open at 10 a.m. on five different days, that it was closed on two days, and that on the afternoon of the fire there was a loss of business from 3.15 to 5.30 p.m. (RT X: 2891-3). Upon receipt of Martin's final report the Connecticut Company issued a draft to him for $166.96 in payment of his services and another draft for $2,029.61 to Don Burton's Shoe Salon (RT II: 584; IX 2902).

Subsequent to Martin's surrender, he turned over certain records and files of his office, which included

therein the previously referred to Exhibit No. 3 which Martin stated was the computation of the stock loss as drawn up by Sugarman in Sugarman's own handwriting (RT VIII: 2487, 2567). Martin stated that the figures so set forth were the basis of the computation of the loss submitted (RT VIII: 2499); that his schedule dated February 2, 1946, relating to shoes, carpets, furnishings, and other merchandise, showing an alleged damage of $15,550.59, was prepared from the information given him by Sugarman (RT VIII: 2567); and that he copied these figures without correction or alteration as to his statement of the cash value and loss submitted to the Phoenix Company (RT IX: 2834-5).

ARGUMENT

SUMMARY OF ARGUMENT

I. The Decision of the Court Below Did Not Violate Petitioner's Rights Under the Fourteenth Amendment to the Constitution of the United States.

A. No Question of a Mass Trial Was Involved in the Instant Proceeding.

B. Sections 954 and 1098 of the Penal Code of the State of California Are Constitutional.

II. The Petitioner Was Granted Equal Protection of the Laws.

I. The Decision of the Court Below Did Not Violate Petitioner's Rights Under the Fourteenth Amendment to the Constitution of the United States

The evidence hereinabove set forth and reflected in the decision of the District Court of Appeal clearly establishes the petitioner's activity in the offenses charged. The original transcript in this matter contained over 6,000 pages of testimony. There were cer-

tain conflicts in testimony which were resolved against the defendants and petitioner herein by the jury and affirmed on appeal.

People v. *Newland,* 15 Cal. 2d 678, 104 P. (2) 778;
People v. *Perkins,* 8 Cal. 2d 502, 66 P. (2) 631;
People v. *Tom Woo,* 181 Cal. 315, 184 P. 389.

The foregoing determination by the triers of fact was not so lacking in evidentiary support that to give it effect would work that fundamental unfairness which is at war with due process; therefore, this court is not warranted in refusing to accept such determination.

Lisenba v. *California,* 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280.

Due process of law is process due according to the law of the land. This process in the State is regulated by the law of the State and the due process clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein.

Holden v. *Hardy,* 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780;
Hurtado v. *State of California,* 110 U. S. 516, 4 S. Ct. 111, 121, 27 L. Ed. 232;
Twining v. *New Jersey,* 211 U. S. 78, 112, 29 S. Ct. 14, 53 L. Ed. 97.

A. NO QUESTION OF A MASS TRIAL WAS INVOLVED IN THE INSTANT PROCEEDING

Petitioner is urging as his first specification of error that the application of Sections 954 * and 1098 * of

* Sections 954 and 1098 of the Penal Code are set forth in the Appendix hereto.

the Penal Code of the State of California to the instant matter permit a "mass trial" to the defendant's prejudice and therefore are violative of the Fourteenth Amendment to the Federal Constitution.

A brief examination of the record discloses the fallacy of the petitioner's contention. There were only three defendants involved in this matter. In the first count of the indictment all defendants were joined in a *conspiracy* charge; in the second count, the substantive offense of grand theft, all the defendants were jointly charged; in the third to eighth counts, two of the defendants were charged, and in the ninth and last count the petitioner herein was solely charged with a violation of Section 556 of the Insurance Code.

All of the offenses charged grew out of the same transaction, the claimed fire loss and the subsequent false insurance claims made by the defendants. The evidence showed that no damage resulted from the fire. Contrary to petitioner's contention, at least 75 percent of the evidence was to the extent of damage done by the fire, if any, and would have been admissible against him on a separate trial. The extent of damage done by the fire, if any, was the substantial element of importance common to all the charges of the indictment. Each of petitioner's co-defendants was found guilty of the crimes charged. The appellate courts of the State of California reviewed in detail the evidence presented and the instructions given to the jury. Any error complained of in such trial proceeding was clearly within the scope of the court's

review on appeal and was a matter of state procedure and practice.

The cases cited by petitioner in support of his contention that the petitioner was the victim of a "mass trial" are not in point nor do they support his contention.

In *Boyd* v. *U. S.,* 116 U. S. 616, the court held that the provisions of the revenue laws of the United States allowing a United States court on the motion of the United States attorney to require the defendant to produce his records under penalty of admitting the allegations of the governmental attorney's charge was violative of the Fourth and the Fifth Amendment to the Federal Constitution. *Krulewitch* v. *United States,* 93 L. Ed. 623, merely holds that extra-judicial declarations of a co-conspirator were not admissible in evidence when made after the conspiracy was over. In *Kotteakos* v. *U. S.,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557, the prosecution was in a federal court for a conspiracy to violate the National Housing Act. The court held that the evidence showed more than one conspiracy and that the jury could not possibly have found only one conspiracy; therefore, the trial court erred in instructing the jury that only one conspiracy was shown and that the acts and declarations of one conspirator bound all. In the case of *In re Oliver,* 333 U. S. 257, a prisoner was jailed for contempt under the order of a one judge-grand jury. The court held that the prisoner was denied procedural due process in that he was not afforded a reasonable

opportunity to defend himself against the charge but was tried and convicted in grand jury secrecy. *Snyder* v. *Massachusetts,* 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674, held that the question of admissibility of evidence was for a state court to determine. In *McElroy* v. *U. S.,* 164 U. S. 76, 41 L. Ed. 355, a different factual situation was presented. There, the consolidation for trial of four indictments was held to be unwarranted; since the offenses were not connected in their commission, the nature of the offenses was different and the indictments were against different defendants.

As is apparent, the instant matter is not comparable. Here there were only three defendants including petitioner. They were all charged and convicted of the first two counts in one indictment. Petitioner alone was charged and convicted of the last count of the indictment and the remaining defendants were convicted of all the remaining counts of said indictment. There was a substantial element of importance common to all the offenses, the fire and extent of damage resulting therefrom, if any, upon which the charges were based. The offenses were connected in their commission and they were of the same class of crimes. The great majority of the evidence was necessary to prove the offenses with which petitioner was charged and would have been admissible even on a separate trial of petitioner. In *Pointer* v. *United States,* 151 U. S. 396, the statute relating to joinder was not similar to the California statute but the court, nevertheless, upheld the joinder on the ground there was a close

connection between the two killings and it would have been difficult to separate the proofs of the offenses.

Rule 8(a) and (b) Federal Rules of Criminal Procedure are now substantially similar to the provisions of Section 954 of the Penal Code of the State of California and their application has been upheld.

Cataneo v. *U. S.,* 167 F. (2) 820.

Viewing petitioner's contention realistically, it would appear that he is raising the contention that joinder of defendants or offenses is not permissible under threat of a "mass trial," regardless of whether there are two or more defendants. His statements are not supported by the record nor do they reflect the law in the State of California or that applied by the federal courts.

People v. *Bundte,* 87 Cal. App. 2d 735, 197 P. (2) 823 (cert. den. 337 U. S. 915);
Cataneo v. *U. S.,* 167 F. (2) 820;
Soblowski v. *U. S.,* 271 F. 294 (cert. den. 41 S. Ct. 537, 256 U. S. 697, 65 L. Ed. 1176);
United States v. *Antonelli Fireworks Co.,* 155 F. (2) 631 (cert. den. 67 S. Ct. 49, 329 U. S. 742, 91 L. Ed. 640; rehearing den. 67 S. Ct. 182, 329 U. S. 826, 91 L. Ed. 701);
Caringella v. *U. S.,* 78 F. (2) 563, 567;
Ashe v. *Valotta,* 270 U. S. 424.

This latter decision in *Ashe* v. *Valotta,* 270 U. S. 424, reverses the case of *Ashe* v. *U. S.,* 2 F. (2) 735, cited and relied upon by petitioner on the question of joinder and holds that it is a matter of state procedure.

B. SECTIONS 954 AND 1098 OF THE PENAL CODE OF THE STATE OF CALIFORNIA ARE CONSTITUTIONAL

Section 954 of the Penal Code of the State of California permits the joinder in an indictment of two or more different offenses which are connected together in their commission, or two or more different offenses of the same class of crimes. To render the joining of counts in an indictment valid, the Supreme Court of the State of California in the case of *In re Pearson,* 30 Cal. (2) 871, 186 P. (2) 401, has held it to be sufficient if the offenses are of the same class or "if there is a common element of substantial importance in their commission."

The District Court of Appeal in its decision in the instant matter (91 A. C. A. 817, 836) stated:

> "It clearly appears that in each of the main circumstances the occurrence of the fire, the subsequent attempts to defraud the insurers, and the filing of false claims and appraisals is a common element of substantial importance in the offenses included in the indictment so as to permit their joinder."

In the case of *People* v. *Bundte,* 87 Cal. App. (2) 735, 197 P. (2) 823 (cert. den. 337 U. S. 915), the defendants therein urged that the application of Section 954 of the Penal Code resulted in a denial to them of due process of law. In that case the indictment contained three counts of riot—violation of Section 404 of the Penal Code, and nine counts of assault with a deadly weapon—violation of Section 245 of the Penal Code. The first two counts of riot occurred several

days previous to the third riot count and the assault charges and at different places. The district court in its decision held that the joinder was proper as all offenses charged grew out of the same series of connected transactions and that they belonged to the same class or character of offenses—also that there was a common element of substantial importance in their commission. A hearing was denied by the California Supreme Court and by this court.

See also the companion case of *People* v. *Moore,* 87 Cal. App. (2) 753, 197 P. (2) 835 (cert. den. 337 U. S. 915).

In the case of *People* v. *Jordan,* 24 Cal. App. (2) 39, 74 P. (2) 519, the indictment contained two conspiracy counts against all defendants and thirteen counts merely charging some two of the defendants with the substantive offenses. In finding the indictment valid and the motions for separate trials made by the various defendants properly denied, the court stated:

"All of the offenses were of the same general class and involved largely the same evidence, and it could well be said that it was in the interest of justice that all of the charges be tried together. The matter was one within the discretion of the court and nothing appears to show that this discretion was abused."

See also *People* v. *Flores,* 62 Cal. App. (2) 700 145 P. (2) 318 and *People* v. *Guerrero,* 22 Cal. (2) 183, 137 P. (2) 21, both of which cases uphold said section.

That Section 954 of the Penal Code has long been held constitutional and its application not in violation of constitutional provisions appears from the following cases decided by the various courts of the State of California.

People v. *Kelly,* 203 Cal. 128, 133-5; 273 P. 226;
In re Pearson, 30 Cal. (2) 871; 186 P. (2) 401;
In re Culver, 84 Cal. App. 295, 257 P. 876;
People v. *Grossman,* 28 Cal. App. (2) 193, 82 P. (2) 76;
People v. *Gryszkiewicz,* 88 Cal. App. (2) 230; 198 P. (2) 585.

The contention that this section violates either the federal or the State Constitution by making possible the deprivation of the right to trial by jury as such right existed at common law has been rejected by the California Supreme Court.

In re Pearson, 30 Cal. (2) 871; 186 P. (2) 401;
People v. *Kelly,* 203 Cal. 128, 133-5; 263 P. 226.
See, also, *Ashe* v. *Valotta,* 270 U. S. 424, 46 S. Ct. 333, 70 L. Ed. 662.

To afford due process of law an indictment or information must contain a statement of the facts which constitute the offense with reasonable certainty so as to advise the accused what he has to meet and give him a fair and reasonable opportunity to prepare his defense. Due process is not denied by grouping several felony counts in one indictment or by a statute, such as Section 954, which authorizes the charging of two or more different offenses of the same class of

crimes or different offenses growing out of the same transaction in one indictment or information.

16 Corpus Juris Secundum, Sec. 587, p. 1180;
42 Corpus Juris Secundum, Sec. 180, p. 1140.

Section 1098 of the Penal Code deals with the trial of defendants who have been charged jointly, the requirement being that they be tried jointly unless the court shall order separate trials. This section is declaratory of the common law. (*People* v. *Perry,* 195 Cal. 623, 234 P. 890). In the case of *People* v. *Dowell,* 204 Cal. 109, 266 P. 807 (cert. dis. 278 U. S. 680, 49 S. Ct. 7, 73 L. Ed. 568), the validity of this statute was in issue and the court stated, "there is no federal question, constitutional or otherwise, involved." In the case of *People* v. *Yeager,* 194 Cal. 452, 229 P. 40, the California Supreme Court stated with relation to this section:

> "It is within the province of the legislature to vest the trial court with authority to decide whether there shall be a separate or a joint trial of defendants jointly charged."

To the same effect, see, *People* v. *England,* 140 Cal. App. 310, 315, 35 P. (2) 565.

The law of the State of California vests the trial court with discretion in granting a separate trial and this discretion will not be interfered with by an appellate court in the absence of a showing of abuse of discretion. (*People* v. *Baa,* 24 Cal. (2) 374, 150 P. (2) 1; *People* v. *King,* 30 Cal. App. (2) 185, 85 P. (2) 928; *People* v. *Eudy,* 12 Cal. (2) 41, 45, 82 P. (2) 359).

The state courts reviewed this action of the trial court and found that it acted within its discretion in denying petitioner a separate trial. Clearly this was a question within the confines of state procedure and discloses no federal question for the federal courts follow the same rule.

Soblowski v. *U. S.*, 271 F. 294 (cert. den. 256 U. S. 697).

Where, as in this matter, nearly all of the evidence related to the fire and the extent of the damage, if any, caused thereby and would have been admissible in a separate trial of petitioner, it is apparent as found by the state courts, that the trial court did not abuse the discretion residing in it when it denied petitioner's motion for a severance. Sections 954 and 1098 of the Penal Code of the State of California in their application to the petitioner herein did not in any wise constitute a denial to him of due process of law guaranteed him by the Fourteenth Amendment to the Federal Constitution, nor has he demonstrated that their application prejudiced his constitutional rights in any manner.

II. The Petitioner Was Granted Equal Protection of the Laws

As was stated by this court in the case of *Lisenba* v. *California*, 314 U. S. 219, 227-8, 86 L. Ed. 166, 62 S. Ct. 280, 286:

"* * * The Fourteenth Amendment leaves California free to adopt a rule of relevance which the

court below holds was applied here in accordance with the State's law."

The procedure adopted by the State of California with relation to the joinder of offenses in an indictment and information and with relation to joint trials is a matter of state procedure. A review of the record discloses that the petitioner herein was accorded a fair and complete trial. Notwithstanding petitioner's allegations of "mass trial," there is nothing in the record to support such contention where but three defendants were charged and jointly tried for offenses arising out of one transaction. There is no question but that petitioner herein was adequately represented at all stages of the proceeding. Petitioner has presented no facts substantiated by the record to show that he "was singled out for invidious treatment," and thus denied due process of the law.

The cases cited by petitioner in support of this contention are not in point. In *Francis* v. *Resweber,* 329 U. S. 459, a defendant convicted of murder and sentenced to be executed was returned to prison after his execution failed due to mechanical difficulties. He urged that a second attempt at execution would result in a cruel and unusual punishment and double jeopardy. This contention was rejected by the court. The court made the following statement, however, which is directly applicable to this matter, "So long as the law applies to all alike, the requirements of equal protection are met." *Kotch* v. *Pilot Comm'rs.,* 330 U. S. 552, involved the constitutionality of the pilotage law of

Louisiana which was found to be constitutional even though it affected the activities of some groups differently from the manner in which it affected the activities of other groups. *Alston* v. *School Board,* 112 F. (2) 992, related to an injunction proceeding brought against state school authorities by a Negro school teacher where discriminatory pay rates based on race were found to deny petitioner equal protection of the laws. *Burt* v. *City of New York,* 156 F. (2) 791, held that the members of an administrative board were civilly liable in an action brought in a federal court if they injured plaintiff by purposeful discriminatory action under pretended justification of statute. In *Yick Wo* v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220, the fact that the defendant was denied the right to engage in certain occupations solely because of the fact he was Chinese was held to result in denial of equal protection of the laws. In *Hysler* v. *Florida,* 315 U. S. 411, this court upheld the Florida procedure requiring leave of court first being granted before a petition for writ of error coram nobis could be filed as not resulting in a lack of due process. In *American Sugar Refinery Co.* v. *Louisiana,* 179 U. S. 89, 45 L. Ed. 102, a state statute imposing a license tax on the refining of sugar and molasses but exempting therefrom planters and farmers growing their own sugar was held constitutional and as not denying sugar refiners equal protection of the laws under the Fourteenth Amendment.

Thus it would appear that none of the cases cited by petitioner in any way constitute authority for his position in the instant matter.

The history of the joinder statutes in California and also in the federal courts shows the tendency to liberalize such procedure in order to expedite the course of justice and relieve the state and federal governments of the burden of a multiplicity of different trials involving the same evidence. As hitherto set forth petitioner has not been singled out for invidious treatment but the law applies to all alike in California and has been so administered.

People v. *Jordan,* 24 C. A. (2) 39, 74 P. (2) 519;
People v. *Flores,* 62 C. A. (2) 700, 145 P. (2) 318;
People v. *Guerrero,* 22 Cal. (2) 183, 137 P. (2) 21;
People v. *Kelly,* 203 Cal. 128, 263 P. 226;
People v. *Dowell,* 204 Cal. 109, 266 P. 807 (cert. dis. 278 U. S. 660);
People v. *Bundte,* 87 Cal. App. (2) 735, 197 P. (2) 823.

In this respect respondent would note that the quotation from the case of *People* v. *Brower,* 92 A. C. A. 668, 207 P. (2) 571, is from the dissenting opinion and not from the majority opinion of the court.

CONCLUSION

Respondent submits that upon the record and for the reasons stated it is sincerely believed that petitioner has not stated a federal question of substantial importance warranting this court in issuing the writ

prayed for. The petitioner received a very fair and impartial trial, the jury was fairly and fully instructed on all material issues, and there was no miscarriage of justice. The matter was decided pursuant to well-established principles of California law and Sections 954 and 1098 of the Penal Code of the State of California in their application to the instant matter do not deny petitioner any of his rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

It is, therefore, respectfully submitted that the petition for writ of certiorari in the instant matter should be denied.

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San Joaquin County

Dated, Sacramento
November 4, 1949

In the Supreme Court
OF THE
UNITED STATES

OCTOBER TERM, 1949
No. ----------

BEN SUGARMAN,
Petitioner,
v.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

Comes now, the respondent The People of the State of California and objects to the request of petitioner to dispense with the printing of the record on the Petition for Certiorari and on the hearing thereof in that petitioner herein has presented no grounds to the court to except himself from the provisions of Rule 38 of the Rules of the Supreme Court and that he should not be entitled to the granting of such motion without a showing that petitioner is insolvent and unable to bear the burden placed upon litigants in this court

who also are and have been in prison pending the application for a writ of certiorari to this court.

Dated: Sacramento, California
November 4, 1949

FRED N. HOWSER
Attorney General of the
State of California
Attorney for Respondent

Of Counsel:

DORIS H. MAIER
Deputy Attorney General

CHESTER E. WATSON
District Attorney
County of San Joaquin

APPENDIX

California Penal Code, Section 954

An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes of offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.

California Penal Code, Section 1098

When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at

different trials, or may order a separate trial for each defendant. If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by section 1070 of this code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

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